

Perspectives on Property Law

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ASPEN COURSEBOOK SERIES

Perspectives on Property Law

Fourth Edition

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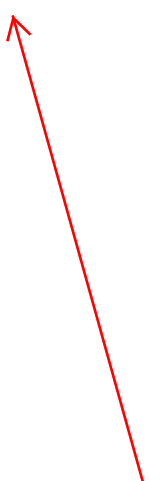
To Jenny and Owen
R.C.E.

To Hugh and Marie
C.M.R.

To Hannah
H.E.S.

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This reader covers the major topics of the first-year property course from a variety of disciplinary perspectives. While the roots of this reader are in law and economics and the reader continues to feature a number of classic and modern economically oriented readings, we have included readings from psychology, sociology, and philosophy. Within these disciplines a diversity of perspectives are represented. The book can be used either as a supplement to any first-year property casebook or as a source of readings in a seminar on property.

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Preface

Property is a term that triggers strong emotions. For some, including the Founders, it carries the promise of prosperity and freedom from tyranny. For others, it signifies blind defense of a status quo characterized by unequal wealth. Issues of property have inspired philosophical comment at least since Plato. Unlike many philosophical issues, however, they have also provoked intense popular concern. Wars and revolutions are commonly fought over property rules and property distributions. Property teachers can deservedly note that issues in torts and contracts (the other foundational private-law subjects) are rarely so explosive.

Despite its highly charged subject matter, property law often strikes law students as a confusing jumble of doctrines that apply to relatively unconnected sets of disputes. To counter that impression, we have designed this reader primarily for use in an introductory course on property law and seminars on property. Because the structure of property institutions has increasingly attracted interdisciplinary study, we expect that students and researchers in other fields may also benefit from both the selections and our notes and questions.

Although we have consciously included a highly diverse set of readings in this volume, we aim not to add to the confusion but to help the student to identify fundamental questions linking conventionally separated pockets of property law. An understanding of these interconnections should provide a foundation for advanced study in highly diverse property-related fields: to name just the most obvious, environmental policy, poverty law, intellectual property, real estate, family wealth transactions, taxation, urban government, natural resources, and legal history.

This fourth edition of this reader continues an approach tracing back to the landmark first edition—Bruce Ackerman’s *Economic Foundations of Property Law*, published in 1975. Like all previous editions, this edition contains many selections, both classic and more recent, in law and economics. Like its two immediate predecessors, this edition includes selections taken from sociology, psychology, history, philosophy, gender studies, game theory, and law and literature. To reflect recent trends in property scholarship, we have added in this edition additional classic readings from philosophy, law and economics studies employing empirical methods, and readings in what is known outside the United States as private law theory. Which, if any, of these perspectives will make the most lasting contributions

to legal thought presently remains murky; the readers of this volume are members of one of the juries that will decide.

The selections appearing here have been rigorously edited. Most footnotes have been deleted; those that remain retain their original numbers, and readers will notice large gaps in the sequences. Any reader who finds an excerpt stimulating is urged to consult the fuller original. After all, these excerpts were chosen not only to clarify, but to provoke.

*Robert C. Ellickson
Carol M. Rose
Henry E. Smith*

*April 2014
Cambridge, Massachusetts*

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argument that economics is also basically rhetorical, see Donald McCloskey, *The Rhetoric of Economics* (1985).

Do people really use “stories” to change their own and other peoples’ minds and behaviors? How important, for example, are stories for lawyers? The burgeoning literature on legal storytelling received a stinging critique in Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *Stan. L. Rev.* 807 (1993).

5. Isn’t this selection a piece of rhetoric too? Why, for example, do the characters have the names they do? Why do the possible preference orderings (“I get a lot, you get a little,” for instance) wind up falling so neatly into a prisoner’s dilemma box?

B. Property and Prosperity

Commentaries on the Laws of England*

Each reading is heavily edited so that students encounter many topics in a short time. The editing has preserved the core of the content and maintained smooth readability.

William Blackstone

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right. Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favor, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land: why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him: or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reason for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

*Source: Vol. 2, *2-*11 (1766).

equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance; which may be considered either as a continuance of the original possession which the first occupant had, or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. . . .

The most universal and effectual way of abandoning property, is by the death of the occupant: when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him: which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for, then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments, which are calculated for the peace of mankind such a constitution would be productive of great inconveniences, the law of almost every nation (which is either given the dying person a power of his possessions by will; or, in case he has not committed to make any disposition at his own steps in, and declares who shall be his successor; that is, who alone shall be the next occupant, in order to avoid that confusion which would occasion. . . .

The extensive notes provide a starting point for reflection and discussion. They contain numerous references to the literature and pointers to other parts of the book that have some, sometimes subtle, connection to the material at hand. The reader is well known as serving as an entry point into the vast literature on property law and policy.

NOTES AND QUESTIONS ON THE BLACKSTONIAN VISION

1. Blackstone begins by remarking on people's uneasiness about the basis of property. Does this suggest, as some have said, that property is ultimately based on theft, and that, moreover, people realize this and hence are nervous about their own titles? The view that property is theft was most famously stated by P.J. Proudhon, *What Is Property?* (1840). Marx's view was somewhat similar; see *The So-Called Primitive Accumulation*, in *Capital*, pt. 8 (3d ed. 1883).

On Blackstone's account, what does property *do* for people? Why have property regimes if property makes people nervous?

2. Blackstone names several "principles" upon which property may be based, including (a) God's gift to all mankind, (b) an analogy to animal nesting behavior, (c) reward to labor, (d) "necessity" for agriculture, and (e) occupancy. How do these principles fit together, if they do? Which, if any, overcome the charge that property is theft? Do you think that Blackstone really cared? (Note, for example, his comment on the "scholastic" dispute between Grotius and Locke.)

5. According to M & S, as technological innovations reduce the costs of storing and processing information, legislatures (and perhaps courts?) should allow an increasing diversity of legal forms. Nonetheless, some legal reformers still seek to simplify the law of property. Proposals for reducing the number of estates in land and future interests have been kicking around for a long time. See, e.g., T.P. Gallanis, *The Future of Future Interests*, 60 Wash. & Lee L. Rev. 513 (2003); Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 Harv. L. Rev. 729, 732 (1972). Given M & S's analysis, would such reforms be worthwhile?

6. Are M & S overly sanguine about legislative, as opposed to judicial, control over the forms of property ownership? Might legislatures be more hidebound than courts? Consider the trust, widely regarded as one of the magnificent innovations of Anglo-American judge-made law, which has yet to win legislative authorization in Continental legal systems. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 669-671 (1995).

7. In later articles M & S have stressed that the in rem character of property rights is what drives lawmakers to simplify how these rights can be packaged. Because property rights must be respected by "all the world," offbeat packages may impose large informational burdens on ordinary people in the conduct of their daily lives. See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 Colum. L. Rev. 773 (2001); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 Yale L.J. 357 (2001).

8. As M & S note, the problem of too many *types* of ownership interests is distinct from the problem of too many *owners* of given types of interests. On the latter problem, see the discussions of the commons and anticommons in Chapter 2, and also Michael A. Heller, *The Boundaries of Private Property*, 108 Yale L.J. 1163 (1999). Unlike M & S, who take possible property forms as rankable in order of usefulness and the *numerus clausus* as a cutoff point, some authors see in the *numerus clausus* a substantive principle. See Nestor M. Davidson, *Standardizing Property Rights*, 137 Vand. L. Rev. 1597 (2008); Joseph A. Auer, *Property Law in a Free and Democratic Society: One Tell the Difference?*

Materials on landlord-tenant, organizational law, and common-interest communities have been brought together under a new heading, "entity property." This allows comparison of some of the complex hybrids of exclusion and governance common to these areas. The coverage and organization of these important areas promote an understanding of property as an element in other subjects of the curriculum, including business organizations.

C. Entity Property

Poor Tenants, Poor Landlords, Poor Policy*

Irving Welfeld

A "Saturday Night Live" routine, in which Eddie Murphy (playing a convicted murderer) recites a poem entitled "Cill My Landlord," tells us a great deal about the public image of American landlords. The owner of rental

*Source: Public Interest 110-117 (No. 92, Summer 1988).